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CASE NO. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
LINCOLN ISAAC,
Respondent.

E.P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,
v.
KENNETH L. BELL,
Respondent.

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
HOWARD HUGHES,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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State v. Isaac CCP Pickaway Cty. #75-CR-83

NO. 75-CR-83
[FILED MAY 30, 1975]

*Clerk Stamp Deleted

Indictment for Felonious Assault, Crim.R. 7, ORC 2945.75, 2941.17, 2941.25, 2941.060

The State of Ohio, Pickaway County, ss: Court of Common Pleas of the April Term, second session of the grand jury in the year of our Lord One Thousand Nine Hundred and Seventy-Five.

The jurors and the grand jury of the State of Ohio, within and for the body of Pickaway County, on their oaths, in the name and by the authority of the State of Ohio, do find and present that Lincoln Isaac on the 29th day of April, 1975, at the County of Pickaway, or by some manner enumerated in section 2901.12 of The Ohio Revised Code whereby proper venue is placed in the County aforementioned, did unlawfully, did, knowingly, cause serious physical harm to Bernard Engle.

Contrary to and in violation of section 2903.11 of the Ohio Revised Code and being a felony of the second degree and being against the peace and dignity of The State of Ohio.

I do hereby certify that this is a true and correct copy of the pleading on file in this office.
*Signature deleted
Clerk of Courts, Pickaway County

*Signature deleted
Prosecuting Attorney for Pickaway County
Prosecuting Attorney for Pickaway County, by

Assistant Prosecuting Attorney

ENDORSED: A TRUE BILL

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position of this defendant, with his characteristics, his knowledge or lack of knowledge, and under the circumstances and conditions that surround him at that time. You must consider the conduct of the defendant and determine if his acts and words—the conduct of Bernard Engle, and determine if his acts or words caused the defendant to reasonably and honestly believe that he was about to be killed or to receive great bodily harm. The law does not measure nicely the degree of force which may be used to repel an assault. However, if a person who is assaulted uses more force than reasonably appears to be necessary under the circumstances and if the force used is so grossly disproportionate to his apparent danger as to show revenge or an evil purpose to injure his assailant, then the defense of self defense is not available.

The burden of proving the defense of self defense is upon the defendant. He must establish such defense by a preponderance of the evidence. Now a preponderance of the evidence is the greater weight of the evidence, that is, evidence that you believe because it outweighs or overbalances in your mind the evidence that is opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may or may not be identical with quantity, that is, the greater

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number of witnesses. In determining whether or not an issue has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon that issue, regardless of who produced it. If the weight of the evidence is equally balanced or if you are unable to determine which side of an issue has the preponderance, then the defendant has not established such issue of self defense.

Now, further defining the matter of self defense, Ladies and Gentlemen of the Jury, the defendant must establish that the other party was the aggressor and that the defendant did not himself provoke and cause the injury. The plea of self defense is not available to the person who starts a fight unless, in good faith, he withdraws from the contest and informs the other party of his withdrawal, or by words or acts reasonably indicates that he has withdrawn and is no longer participating in the fight. A defendant is not in a position to claim self defense, if he sought trouble and he provoked a fight and did

not attempt to avoid it or to leave the scene of the trouble. If, in the careful and proper use of his faculties, the defendant honestly believed and had reasonable grounds to believe that an assailant was not able and did not intend to kill or do great bodily harm to the defendant, then the defendant having notice of his adversary's position

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was released from the danger, and the right to use force in self defense ended. If thereafter the defendant continued to fight, he becomes the aggressor and a subsequent injury to another is unlawful. Therefore, Ladies and Gentlemen of the Jury, you will then consider the matter of self defense which I gave to you, and the burden of proof of self defense is upon the defendant by a preponderance of the evidence.

Now, I will attempt, Ladies and Gentlemen of the Jury, to summarize for you the matters relative to the defense of the lesser included offense and self defense. If the State has proven to you beyond a reasonable doubt all of the essential elements of the crime of felonious assault, if the defendant has failed to prove by a preponderance of the evidence the defense of self defense, then your verdict would be one finding the defendant guilty of the offense charged, felonious assault. However, if you find the State has failed to prove any one of the essential elements of the crime of felonious assault, you would find the defendant not guilty of that crime. You would then proceed with your deliberations to determine whether the State has proven beyond a reasonable doubt all of the essential elements of the lesser included offense of aggravated assault. If you find that the State has proven beyond a reasonable doubt all of the essential elements

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of the lesser included offense of aggravated assault, then your verdict would be one finding the defendant not guilty of felonious assault, but guilty of the lesser included offense of aggravated assault. On the other hand, if you find the State has not proven beyond a reasonable doubt each and every one of the essential elements of aggravated assault, you would then consider whether the State has proven beyond a reasonable doubt all of the essential elements of the lesser included offense of assault. If you find the State has proven all of the essential elements of the lesser included offense of assault, you would then according to your previous finding, if that is your finding, find the defendant not guilty of felonious assault, not guilty of the offense of aggravated assault, but guilty of the lesser included offense of assault.

Now, if you find that the State has failed to prove beyond a reasonable doubt any one of the essential elements of the crime of the lesser included offense, or if you find that the defendant proved by a preponderance of the evidence, the defense of self defense, then in that case your verdict would be one finding the defendant not guilty.

Now, Ladies and Gentlemen of the Jury, you will have with you in the jury room four forms of verdicts. You will use the verdict form that concurs to your finding.

State v. Isaac CA Pickaway #CA 346
No. 346

IN THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY, OHIO

[FILED FEB. 11, 1977]
***Clerk Stamp Deleted**

STATE OF OHIO,
Plaintiff-Appellee
vs.
LINCOLN ISAAC,
Defendant-Appellant

Case #CA-346

OPINION

DATED: February 8, 1977

APPEARANCES

Richard L. Gerhardt, Prosecuting Attorney, Circleville, Ohio, for Appellee.

James R. Kingsley, Circleville, Ohio, for Appellant.

ABELE, J.:

Defendant-Appellant takes this appeal from a jury verdict—finding him in violation of Section 2903.12 R.C.—Aggravated Assault, a felony of the fourth degree. Defendant-Appellant was originally charged by the Grand Jury on Indictment for Felonious Assault, Section 2903.11 R.C. but, the trial jury determined that the lesser included offense was mandated by the facts before them.

The State of Ohio entered into evidence three photographs. One Photo, Exhibit 2, portrays the victim soon after the assault; it is a 8"x10" format, displaying the front facial features, illustrating the victim's injuries. This photo is in black and white. In conjunction with this photo, a doctor testified: describing the extent and type of injuries and to some extent the colors not portrayed by the photo.

A second photo, Exhibit 1, was admitted on motion of the State, over defendant's objection, portraying the victim some time after the assault, while in the hospital and recovering from his injuries. This exhibit, illustrates a front facial view, in color, of the victim. There appears also, a corrective medical appliance attached to and partially surrounding the victims face. Along

with the introduction of this exhibit, the victim testified as to his post- assault medical treatment, and prognosis.

A third photo, State's exhibit 3, in black and white, portrays the crime scene; specifically a street scene with chalked in area, described by an officer as a pool of blood.

Defendant-appellant took exception to the introduction of the photographs.

At the close of the evidence, in the Court's charge to the jury concerning the degree of harm one must apprehend to claim self-defense, the Court related that:

> (t-226) "Now, if the defendant had reasonable grounds and and honest belief that he was in imminent danger of death or great bodily harm and that the only means of escape from such danger by injuring his assailant***."

The Court continued:

> (t-227) "The burden of proving the defense of self-defense is upon the defendant. He must establish such defense by a preponderance of the evidence."

From the jury verdict, Defendant-Appellant takes his appeal to this Court and assigns five errors in the Court below: the first of which is:

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING INTO EVIDENCE PHOTOGRAPHS OF THE COMPLAINANT.

Defendant-Appellant argues that the photos were inflamatory and prejudicial to his cause; that they were neither relevant, material, nor admissable; that the state did not require this evidence to prove serious physical harm.

We cannot agree with the Defendant-Appellant's arguments.

Serious Physical Harm Section 2901.01(E) requires:

> "1. *
> 2. *
> 3. Any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary substantial incapacity.
> 4. Any physical harm which involves some permanent serious disfigurement, which involves some temporary serious disfigurement.

> 5. Any physical harm which involves acute pain of such duration as to result in substantial suffering or which involves any degree of prolonged intractable pain."

This is not a case of prosecutorial "overkill" as the Defendant suggest.

The photo's State's Exhibits 1. 2, 3, are probative of the issue raised by the indictment. As noted by the Plaintiff-Appellee, the admission of such evidence is within the discretion of the court. *State v Cron*, 140 App. 2d 76 43 O. Ops. 2d 201, *State v Fugate*, 36 O. App 2d 131, 65 O. Ops. 2d 1551, *State v. Hill*, 12 O.S. 2d 88, 41 O. Ops. 2d 369.

The Ohio Supreme Court has noted in *State v. Woodards*, 6 O.S. 2d 14, 35 O. Ops. 2d 8, p. 14.

> The rule is well settled that photographs and color transparencies are not objectionable so long as they are properly identified, are relevant and competent and are accurate representations of the scene which they purport to portray. Indeed, photographs frequently convey information to the court and jury more accurately than words. Although a photograph may be rendered, inadmissible by its inflammatory nature the mere fact that it is gruesome or horrendous is not sufficient to render it inadmissable if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury.

In consideration of the State's burden under Section 2901.01 (E) RC the photographs in question were pertinent to the Jury's apprehension of the facts before it and material to the issues to be examined. The out-of-state authority cited by Appellant is not relevant to the Ohio law on this point. The first Assignment of Error is not well taken and overruled.

The second Assignment of Error is:

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING TESTIMONY AS TO THE EXTENT OF THE COMPLAINANT'S INJURIES FAR BEYOND THAT REQUIRED BY THE STATUTORY DEFINITION OF SERIOUS PHYSICAL HARM.

Defendant-Appellant cites the stipulation of facts negotiated before trial as sufficient to establish "Serious Physical Harm" Section 2901.01 (E) RC.

Defendant argues further that, the testimony of the victim, as to prognosis and treatment, as well as the doctor's testimony

as to treatment, and the police officer's testimony, acted cumulatively to lead the court to impose a higher penalty and to cause the jury to ignore the Defendant's plea of self-defense.

Upon review of the entire record, the stipulation and the supportive testimony; the Defendant's argument to limit the State in its presentation of proof cannot be sustained.

The Defendant-Appellant concedes "Serious Physical Harm", but the jury returned a verdict to a lesser included offense, that of Aggravated Assault.

We cannot agree that the State was precluded from introducing further supportive evidence of "serious physical harm". There is no indication in the record that the State was so limited under the terms of the stipulation of facts agreed upon.

The testimony received was highly relevant material and probative of the issues at hand. The Second Assignment of Error is overruled.

The Third Assignment of Error is:

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING DEFENDANT'S INSTRUCTIONS ON SELF-DEFENSE AND FURTHER IN CHARGING THE JURY AS IT DID ON THE AMOUNT OF HARM THE DEFENDANT MUST APPREHEND TO BE ABLE TO AVAIL HIMSELF OF SELF-DEFENSE.

Defendant-Appellant argues and presents cases from Idaho, Iowa, New York, and Texas that provide the requisite amount of apprehension of fear of "bodily harm" to justify action in self-defense. The Trial Court's charge as noted above required the apprehension of "great bodily harm" and came directly from the recommended charges in Ohio Jury Instructions Section 411.311,. 33,.35. Further;

> "A person who is assaulted, if he believes or has good reason to believe that he is in danger of *great bodily harm*, may use sufficient force to repel his assailant and save himself harmless, but no more." (Emphasis added)

See, *State v. Hilbrant*, 7 O. Law Review 440, 54 Wkly, Law Bull. 513, Add'd 83 O.S. 491, 94 NE 1108, *State v. Wilson*, 127 NE 2d 426, 70 O.L.A. 147, *State v. Valter*, Dayton 390, *State v. McLeod*, 82 O. App. 155, 80 N.E. 2d 699.

Unlike the law of the states relied upon by Defendant-

Appellant, Ohio has promulgated and required an apprehension of "great bodily harm" to justify reasonable action in self-defense. Defendant's requested special charge was incorrect and the use of the standard jury instruction by the trial court is sustained. The third Assignment of Error is overruled.

The Fourth Assignment of Error is:

> THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY THAT THE DEFENDANT HAD A DUTY TO RETREAT BEFORE AVAILING HIMSELF OF SELF-DEFENSE.

Once again the Trial Court took its charge to the jury from Section 411.31 *Ohio Jury Instructions*. The Defendant-Appellant argues that the court's charge was incorrect. Examination of the charge on this point reveals two occasions on which the Court discussed retreat and neither of these remotely address the proposition to which the Defendant-Appellant refers.

As noted by the reference cited in Plaintiff-Appellee's Brief (t-225-226):

> "Now, if a person is assaulted by another, who apparently intends to kill or cause great bodily harm, the person assaulted is not required to retreat but may repel force with force, and inflict the harm, if it reasonably appears to the defendant to be necessary to do so."

The Defendant-Appellant's Fourth Assignment of Error is not well taken and overruled.

The Fifth Assignment of Error is:

> THE COURT COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE JURY THE DEFENDANT HAD TO PROVE THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE.

In support of his argument Defendant-Appellant cites *State v. Robinson*, 47 O.S. 2d 103, 1 O. Ops. 3rd 61, 351 N.E. 2d 88, a recently decided Ohio Supreme Court case, eliminating the degree of proof referred to above. A review of the transcript reveals that in his opening statement (t-12) and Closing (t-189-201) statement, Defendant's counsel stated to the jury that the burden of proof was by a "preponderance of the evidence". Further, Defendant-Appellant made no objection to that portion of the charge dealing with that burden of proof, as required for review under the terms of Ohio Rules of Criminal Procedure, Rule 30. The failure to make such an objection waives any

error not called to the attention of the trial court. As noted by Plaintiff-Appellee, see also, *State v. Glaros*, 170 OS 471, 11 O.Ops 2d 215, *State v. Slone*, 45 O. App. 2d 24, 74 O. Ops 2d 66. The fifth Assignment of Error is not well taken and overruled; the verdict of the jury is affirmed.

Judgment Affirmed

Gray, P.J. and Stephenson, J. Concur

State v. Isaac (Ohio Supreme Court) #77-412

NO. 77-412

THE SUPREME COURT
OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.
STATE OF OHIO,
Appellee
vs.
LINCOLN ISAAC,
Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS for PICKAWAY COUNTY

[FILED JULY 20, 1977

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by James R. Kingsley

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

State v. Isaac (Ohio Supreme Court) #77-412

No. 77-412

THE SUPREME COURT OF OHIO

[FILED JULY 20, 1977]

THE STATE OF OHIO,

CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,
vs.
LINCOLN ISAAC,
APPELLANT.

APPEAL FROM THE COURT OF APPEALS FOR PICKAWAY COUNTY

This cause, here on appeal as of right from the Court of Appeals for Pickaway County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Pickaway County for entry.

I, Thomas L. Starzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

State v. Bell (CCP Cuyahoga) #16366

THE STATE OF OHIO
vs.
KENNETH L. BELL

A TRUE BILL
INDICTMENT FOR
AGGRAVATED MURDER
2903.01

[FILED Oct. 11, 1974]
***Clerk Stamp Deleted**

Date of Offense: September 15, 1974
The Term of September of 1974
Case No. 16366

THE STATE OF OHIO,
Cuyahoga County

* The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely and with prior calculation and design, caused the death of another, to-wit: Nathaniel Reese

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Foreman of the Grand Jury

Prosecuting Attorney

NO. 34727

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
County of Cuyahoga

[FILED APRIL 8, 1976]

STATE OF OHIO
Appellee
vs.
KENNETH BELL
Appellant

APPEAL FROM
COMMON PLEAS COURT
(Criminal)
No. 16366

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Appellant Kenneth Bell was indicted on October 11, 1974 for aggravated murder, R.C. 2903.01. The indictment alleged that appellant had purposely, and with prior calculation and design, caused the death of Nathaniel Reese. On April 15, 1975, following a trial before a jury, appellant was found guilty of the lesser included offense of murder. R.C. 2903.02.

From his conviction appellant has brought this appeal alleging five assignments of error.

The first and fifth assignments of error allege that the verdict is against the weight of the evidence and that the prosecutor failed to establish the *corpus delicti* and the identity of the victim. Both assignments of error are without merit.

In a criminal prosecution the state is required to prove all material facts relating to the crime charged, including those facts relating to the *corpus delicti*, which is the body or substance of the crime charged. *State v. Manago* (1974), 38 Ohio St. 2d 223. The *corpus delicti* in a homicide prosecution involves two

elements: (1) the fact of death, and (2) the existence of the criminal agency of another as the cause of death. *State v. Manago, supra.* The *corpus delicti* is sufficiently established if the state produces some evidence to support the fact that a human being came to his death by criminal means. *State v. Cosby* (1959), 110 Ohio App. 222. Proof of the identity of the victim is not necessary to establish the *corpus delicti. State v. Schaeffer* (1960), 113 Ohio App. 125; *State v. Cosby, supra.*

In this case the *corpus delicti* was adequately established. Dr. Lester Adelson, Deputy Coroner for Cuyahoga County, testified that he performed an autopsy on September 16, 1974 on a corpse which he had been told was that of Nathaniel Reese. Dr. Adelson testified that the autopsy showed that the individual's death was caused by two gunshot wounds perforating the chest and abdomen leading to massive fatal hemmorrhaging. There were two other non-fatal wounds. His conclusion was that the death was a homicide. The autopsy report, which was introduced into evidence, certifies that the autopsy was performed on the body of Nathaniel Reese. This evidence adequately establishes the *corpus delicti* and the identity of the victim in this case.

Appellant also contends that the verdict was against the weight of the evidence, and that it was not proven that the person allegedly shot by appellant was the same person on whose body the autopsy was performed on September 16, 1974.

It is our conclusion that these contentions are without merit.

The evidence shows that on the evening of September 15, 1974 appellant was at the Willow Inn on East 49th Street drinking with James Clark and several other individuals. At approximately 8:00 p.m. appellant received a phone call from Robert Vaughn, who was a bartender at the Hub Cafe, another bar in the same neighborhood.
Mr. Vaughn told appellant that five black males had entered the Hub Cafe, and that he was afraid that there might be trouble. Appellant and James Clark decided to go to the Hub Cafe in response to the call from Mr. Vaughn. Appellant, who also worked as a bartender, was one of a group of individuals who worked in bars in the area who agreed to call each other for help if it looked like trouble might develop in one of the neighborhood bars in which they worked.

Appellant and Clark proceeded to the Hub Cafe in Clark's car. When they arrived, they saw Robert Vaughn standing outside of the Hub Cafe. Appellant asked Vaughn, "Where are the colored guys?" Vaughn told appellant that they had left the bar and had gone down East 55th Street. Appellant and Vaughn proceeded in the direction that the black men had gone. Near the corner of East 55th and Broadway appellant and Vaughn approached two of the black males. At the time appellant was armed with a .32 caliber pistol. As appellant drew nearer to the men he fired his gun several times. One of the black men fell to the ground.

At trial, appellant claimed that he fired in self-defense. He testified that as he approached the two black men, Vaughn yelled, "He's got a gun," or "Watch out, he's got a gun." At that point, appellant said that he spun around and started shooting. He stated that he did not know where he pointed the gun and that he did not know if he actually shot the victim. He further said that he saw one of black men with a gun.

After the shooting, appellant got back in Clark's car, and put his gun away. As they were leaving the scene, appellant made several statements to Clark, including "I think I killed him," and "It was easy."

The police were called and arrived on the scene at approximately 8:02 p.m. Patrolman George Unger of the Cleveland Police Department found a young black male lying on the sidewalk near East 55th and Broadway. He assisted in putting the individual in a Third District police ambulance wagon, which took the man to St. Alexis Hospital.

Detective John Staimpel of the Cleveland Police Department was summoned to St. Alexis Hospital at approximately 8:25 p.m. to investigate a homicide which had been reported at East 55th, in the vicinity of Broadway. He and his partner arrived at St. Alexis at approximately 8:35 p.m. Upon arrival, Detective Staimpel observed a Third District police station wagon parked outside of the emergency room, with a body in the back. Detective Staimpel followed the Third District wagon from the hospital to the County Coroner's office. He subsequently viewed the body at the morgue. At trial, he identified photographs as being photographs of the body he had escorted from St. Alexis to the County Coroner's office. These same photographs had previously been identified by the Coroner as having been taken in conjunction with an autopsy performed on Nathaniel Reese.

After leaving the scene of the shooting, appellant and James Clark returned to the Willow Inn. Some time later, appellant and James Clark took Clark's car to the area of West Third Street and left it. Clark then called the police and reported that the car had been stolen. A couple of weeks after the shooting appellant went to Florida, leaving his wife and children in Cleveland. He later returned to Cleveland where he was arrested on March 2, 1975.

It is our conclusion that the above evidence could have properly been believed by the jury, and is sufficient to sustain appellant's conviction for the murder of Nathaniel Reese. The first and fifth assignments of error are overruled.

The second assignment of error states that:

> THE TRIAL COURT ERRED UNDER THE FIRST PART OF THE *NOLTON* RULE IN CHARGING THE JURY AS TO LESSER INCLUDED OFFENSES OR, IN THE ALTERNATIVE, UNDER THE SECOND PART OF THE *NOLTON* RULE THE TRIAL COURT ERRED IN THAT IT FAILED TO CHARGE THE JURY AS TO ADDITIONAL LESSER INCLUDED OFFENSES.

This assignment of error is well taken.

In *State v. Nolton* (1969), 19 Ohio St. 2d 133, the Supreme Court of Ohio enunciated a rule to govern trial judges in the instruction of a jury on a lesser included offense of the offense charged in a criminal case. The court stated:

> If the evidence adduced on behalf of the defense is such that if accepted by the trier it would constitute a complete defense to all substantive elements of the crime charged, the trier will not be permitted to consider a lesser included offense for the reason that an unreasonable compromise would be invited on the state's evidence.
>
> On the contrary, if the trier could reasonably find against the state and for the accused upon one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense, then a charge on the lesser included offense is both warranted and required, not only for the benefit of the state but for the benefit of the accused.

Although each of the above paragraphs in *Nolton* appears to set forth a separate test, it has become clear that in determining whether an instruction on a lesser included offense is warranted and required, both paragraphs must be considered together.

State v. Jones, No. 33966 (Cuyahoga County Court of Appeals, December 23, 1975). Thus, although a defendant may present a defense which, if believed, would constitute a complete defense to all substantive elements of the crime charged, an instruction on a lesser included offense or offenses is still warranted and required in cases where the jury, if it chose not to believe the defendant's defense, could reasonably find against the state and for the accused on one or more elements of the crime charged and for the state on the remaining elements, which by themselves would sustain a conviction for a lesser included offense. *State v. Jones, supra.*

In this case appellant was charged with aggravated murder, which is the purposeful causing of the death of another, with prior calculation and design. R.C. 2903.01(A). Appellant presented the defense of self-defense. If believed, this would have constituted a complete defense to the crime charged. However, the evidence in this case was such that the jury, if it chose not to believe appellant, could reasonably have found against the state and for the accused on the element of prior calculation and design, and for the state and against the accused on the remaining elements of the crime charged. Thus, appellant could reasonably have been found guilty of the crime of murder, which is the purposeful causing of the death of another, without prior calculation and design.

The court properly instructed the jury on both aggravated murder and murder.

Appellant also contends that the court, having decided not to limit the instructions to aggravated murder, should also have instructed the jury on the additional lesser included offenses of voluntary and involuntary manslaughter, negligent homicide, and the four categories of assault as set forth in R.C. 2903.111 through 2903.14. It is our conclusion that the trial court properly refused to instruct on these offenses.

Under the *Nolton* rule, an instruction on a lesser included offense or offenses is required only when the evidence is such that the jury could reasonably find against the state and for the accused on one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense. In this case the crime charged against appellant was aggravated murder. It is our conclusion that the evidence was not of such a nature that the jury could reasonably have concluded that appellant was guilty of any

lesser included offense of the crime charged other than murder.

We find no evidence from which the jury could reasonably have concluded that appellant was guilty of voluntary manslaughter, since there is no evidence that appellant caused the death of Nathaniel Reese "while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force." R.C. 2903.03(A). Therefore, an instruction on voluntary manslaughter would not have been proper. The request for such a charge was properly denied.

Similarly, the record does not reveal any evidence from which the jury could reasonably have concluded that appellant was guilty of either involuntary manslaughter or negligent homicide.

Furthermore, since the evidence clearly shows that the victim died as a result of appellant's action, an instruction to the jury on assault would have been improper. *State v. Champion* (1924), 109 Ohio St. 281.

The third assignment of error is that the trial court erred in not granting appellant's motion for a mistrial on the grounds that the prosecutor's conduct during closing arguments prejudiced the appellant's rights.

Appellant contends that the prosecutor on closing argument went into matters which appellant had been precluded from raising at trial, and which the judge had instructed both parties to avoid on closing argument. In particular, appellant contends that the prosecutor brought up the character of the neighborhood in which the killing took place. However, the record reveals that although the prosecutor did briefly comment upon the character of the neighborhood, he did so only with regard to facts which had been testified to or which had been commented upon by defense counsel in his closing argument.

Appellant also contends that the prosecutor impermissibly suggested that certain witnesses who testified against appellant had not gone to the police sooner than they did because they were afraid of appellant. It is our conclusion that such suggestions by the prosecutor were merely in responses to suggestions by defense counsel that the testimony of these witnesses was unreliable because those witnesses had delayed in coming forward. The prosecutor was justified in replying to those suggestions of defense counsel.

Appellant further contends that the court erred in not instructing the jury to disregard the prosecutor's comment that Duane Yingling, appellant's stepson, was "primed and programmed" before testifying on appellant's behalf. However, the record shows that the boy admitted on cross-examination that he had been instructed by his mother as to certain answers to give in response to a particular question. The prosecutor's remark in his closing argument was a proper comment upon the evidence.

Finally, appellant contends that the prosecutor improperly incited the passion of the jury by including vulgarities in his closing argument. Specifically, appellant objects to the prosecutor's characterization of appellant's own testimony as "a bunch of crap." (R. 852). We find that the use of such descriptive language, although clearly out of place in a closing argument before a jury, was not of such a nature as to unfairly incite the passion or prejudice of the jury.

The third assignment of error is overruled.

The fourth assignment of error is that the court erred in excluding evidence of the character of the neighborhood in which the alleged crime took place. This assignment of error is not well taken.

During the trial appellant repeatedly attempted to elicit testimony concerning the character of the neighborhood where the shooting took place. The trial judge, believing the character of the neighborhood to be only marginally relevant to the issues at trial, was reluctant to allow such testimony. Nevertheless, the judge did allow limited inquiry into this area on a number of occasions. It is our conclusion that the judge properly refused to allow further inquiry on other occasions. The character of the neighborhood was not at issue in the trial and was not relevant to the determination of appellant's guilt in regard to the crime charged. The fourth assignment of error is overruled.

Finding none of the assignments of error to be well taken, we affirm the decision of the Common Pleas Court.

[FILED APRIL 8, 1976]
*Clerk Stamp Deleted

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

MANOS, P.J.,
PARRINO, J. and
KRENZLER J. CONCUR.

JOURNALIZED APRIL 19, 1976
GERALD E. FUERST, Clerk of Courts
By Peggy Moguel Deputy

JOHN M. MANOS
Presiding Judge

For plaintiff appellee: John T. Corrigan
For defendant appellant: Harvey H. Starkoff

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

State v. Bell (Ohio Supreme Court) #76-573

NO. 76-573

OHIO SUPREME COURT

[FILED SEPTEMBER 17, 1976]

THE STATE OF OHIO,

CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,
vs.
KENNETH BELL,
Appellant.

Motion for Leave to Appeal
From the Court of Appeals
for Cuyahoga County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Affidavit of Poverty

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Hughes v. Engle (USDC/NE) #C77-156A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[FILED AUGUST 18, 1977]
*Clerk Stamp Deleted

HOWARD HUGHES,
Petitioner
v.
TED ENGLE,
Superintendent of
Chillicothe Correction Institute
Respondent

CIVIL ACTION NO. C77-156A

(Judge Contie)

REPORT AND RECOMMENDED DECISION OF MAGISTRATE

Howard Hughes, the petitioner, initiated this action for habeas corpus relief pursuant to 28 U.S.C. Section 2254 and his request to proceed informa pauperis was granted by the United States District Judge.

Petitioner was indicted by the Grand Jury, September 1974 Term, of Summit County, Ohio for the crime of aggravated murder, in violation of the Ohio Revised Code Section 2903.01(A). The charge included no specifications for the death penalty.

Petitioner plead not guilty to the indictment. In the ensuing trial by jury, petitioner was found to be guilty of voluntary manslaughter, Ohio Revised Code Section 2903.03, a lesser included offense. As a result of said verdict, petitioner was sentenced on January 27, 1975, to a term in the Ohio penal system of from six (6) to twenty-five (25) years (Case No. CR-74-11-1206).

Subsequent to conviction, petitioner appealed to the Court of Appeals Ninth Judicial District. On September 24, 1975, that Court found that the trial was free from prejudicial error and affirmed in all respects (Case No. 7717).

Subsequent to said proceedings, petitioner filed a motion for leave to appeal from the Court of Appeals in the Supreme

Court of the State of Ohio. On March 19, 1976, the Supreme Court of Ohio dismissed said appeal for the reason it failed to present a substantial constitutional question (Case No. 75-1026).

Petitioner is now before this Court seeking federal habeas corpus relief. In support thereof, petitioner alleges:

(1) The prosecution failed to prove that the accused was guilty as to each and every essential element of the offense charged and the trial court failed to so instruct the trial jury.

(2) The petitioner was subjected to highly prejudicial comments by the prosecutor which were not cured by the Court's instructions to disregard them, and the trial court erred in refusing to declare a mistrial on motion by the defense for this reason. (See petition for Writ of Habeas Corpus, page 4)

Under the first claim above, the petitioner alleges that his rights under the Due Process Clause of the Fourteenth Amendment were violated by the trial court's charge to the jury that a defendant must bear the burden of proving self defense. Among other citations, the petitioner relies upon the doctrine of *Mullaney vs. Wilbur*, 421 U.S. 684 (1975), seeking to apply same to the following charge to the jury:

". . . Now the Defendant is presumed innocent until his guilt is established *beyond a reasonable doubt*. The Defendant must be acquitted unless the State produces evidence which convinces you *beyond a reasonable doubt of every essential element of the crime charged in the Indictment*, or *of any lesser offense included within that charge*. . .Now if you find that the State proved beyond a reasonable doubt *all of the essential elements of Aggravated Murder*, your verdict must be guilty of that crime. And in that event you will not consider any lesser offense. . . .If you find that the State *proved beyond a reasonable doubt all of the essential elements of the lesser crime of Murder*, your verdict must be guilty of Murder. And in that event you will not consider any lesser offense. . . Before you can find the defendant guilty of voluntary Manslaughter, you must find beyond a reasonable doubt that Lemuel Johnson was a living person, that his death was caused by the Defendant in Summit County on or about 26th day of October 1974, that the killing was done knowingly, that the act causing the death was performed while the Defendant was under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force . . . *If the Defendant fails to establish the Defense of Self-defense, the*

State still must prove all of the essential elements of the crime charged or any lesser included offense by proof beyond a reasonable doubt. If you find that the State *proved beyond a reasonable doubt all of the essential elements of the crime of Aggravated Murder, or of the lesser included charges,* and that the Defendant failed to prove by a preponderance of the evidence the Defense of Self-defense, your verdict must be guilty as to the charge of Aggravated Murder, or the lesser included charges. If you find that the State *failed to prove beyond a reasonable doubt any one of the essential elements of the crime of Aggravated Murder,* or any of the *lesser included charges,* or if you find that Defendant *proved by a preponderance of the evidence the Defense of Self-defense, then* you must find the Defendant not guilty (TR. Vol. 2 330-343.) (emphasis added).

Both the Court of Appeals of Summit County, Ohio and the Ohio Supreme Court, rejected each of the petitioner's claim on the merits. *Picard vs. Connor,* 404 U.S. 270 (1971).

On October 26, 1974, petitioner, Lemeul Johnson (the victim), Roger Logan, Marie Hubbard and four of her children, and Minnie Jackson were all at the latter's home at 99 Westwood Avenue, Akron, Ohio (TR. 40-41, Vol. 1) when the petitioner without provocation intentionally shot the victim, Lemuel Johnson, twice in the presence of all these witnesses. They all support conclusively that the petitioner in cold blood and without any provocation, deliberately shot and killed Lemuel Johnson (TR. 47-48, Vol. 1).

Testimony further shows that Marie Hubbard and petitioner had a very close relationship (TR. 74-75, Vol. 1) and, in fact, was his former girlfriend. He attempted to pursue an argument with her as to her relationship with new and present friend, Lemuel Johnson, (TR. 74-75, Vol. 1). The said argument was indirectly aimed at Lemuel Johnson (TR. 78, Vol. 1) and urged Marie Hubbard to reveal alleged past conversations he had with her about her current relationship with Lemuel Johnson (TR. 76, Vol. 1). The evidence further reveals that petitioner had been drinking and used abusive and profane language (TR. 75, Vol. 1). It is clearly admitted by the petitioner that he knowingly and purposely carried a deadly weapon on his person, to wit; a gun and had it readily accessible on his person.

The evidence supports beyond any doubt that Lemuel Johnson immediately before he was shot was extending his hand to shake with petitioner as a gesture of friendship (TR. 94-96, 46, Vol. 1) and no hard feelings. The victim's other hand

was at his side. The petitioner refused to shake hands with Johnson (TR. 82, 49, Vol. 1, 79, 96, 256, Vol. 2). The evidence then proceeds to show beyond any doubt that the petitioner was face to face with Johnson (TR. 79, Vol. 1) and about four feet from him (TR. 80 Vol. 1) when he, the petitioner, withdrew his gun from his person and without any cause or provocation whatsoever, intentionally and purposely fired one shot into Johnson (TR. 48, Vol. 1) and as he was falling (TR. 81, Vol. 1), fired another shot into the victim (TR. 81, Vol. 1). Thereafter, the petitioner pointed the gun at Marie Hubbard (TR. 48-49, Vol. 1) and then gave her the gun, left the scene and was apprehended later by the police.

On direct at the trial, petitioner admitted that he shot Johnson twice (TR. 256, Vol. 2). Petitioner said further he either threw the gun down on the floor or Marie Hubbard took it from him and immediately left the scene (TR. 258, Vol. 2). On page 256 of Volume 1, the petitioner makes a feable attempt to lay out his theory of self defense. The following questions were asked on direct and the following answers:

Q. What was your reply to the hand shake?
A. I told him, "I don't shake like that."

Q. All right, What happened next? Go ahead and tell the Jury.
A. He turned and started toward the door.

Q. Then what happened?
A. He turned around and come back, and that's when he was saying, "I'm going to tell you something. . ." And I couldn't understand what he was saying.

Q. What was he doing when he said that?
A. He hit his pocket, and I told him to get back, and I backed off.

Q. Then what happened?
A. I shot and he kept coming, and I shot twice.

Also on page 258, Volume I, the following questions and answers were asked:

Q. What was your state of mind?
A. I went blank. I didn't understand what happened.

Q. Were you surprised at what you had done?
A. Yes, after I had did it.

Otherwise, the record is completely silent as to other testimony of the alleged basis for the self defense theory. In

the alternative, the petitioner through his counsel, attempts to persuade the jury that the evidence at best makes out a crime of manslaughter and not murder.

In summation the defense stated:

> ". . . then it could be voluntary manslaughter only (TR. 315, Vol. 2) . . . As I said to you in my opening statement, this case never was an Aggravated Murder case. It was a way-over indictment. Purposely, with prior calculation and design? No way. Murder? No way. Voluntary Manslaughter? At the most. However, even though purposely—because there's no question. We admit it was an intentional shot. So it was either Voluntary Manslaughter or it was done for self defense (TR. 319, Vol. 2). . .

It is obvious from the above statement that the defense attempted to make the best of both worlds. The jury by its verdict of manslaughter did in fact find no basis of self-defense.

Prior to the Court charging the jury as to the law, on the record the court asked petitioner's attorney, "What areas would you like charge on?" (TR. 287, Vol. 2). The attorney said, "Yes, I would like to have the charge of lesser included offense of Voluntary Manslaughter, Murder, and *Self-defense*" (TR. 288 Vol. 2) (emphasis added). This the Court gave over the objection of the prosecution and at the request of the defense.

Only the element of intent was in issue. Both Marie Hubbard and her children testified as to the events surrounding the shooting and also gave testimony as to a prior incident wherein the petitioner had threatened Johnson.

Ohio Court of Appeals of Summit County, summed up the entire case as follows:

> ". . . Little evidence, other than defendant's testimony, is shown of any aggressive overt act by decedent compelling or even inciting the defendant to the violent action he took of gunning down and killing Johnson. We reject Error No. 1. The jury had a right, and did find against Defendant's claim of self defense. . .
>
> Our examination of the testimony of the witness in this cause convinces us that the generosity of the jury finding the defendant guilty of the lesser included offense of voluntary manslaughter, as opposed to murder, is most difficult to understand. . ."

The transcript fully supports this conclusion.

I

With respect to the first claim for relief, indeed if the facts were to support same, there would be no quarrel that a conviction that rest upon proof that does not establish each and every element of the crime is surely a violation of due process. However, the facts in this case are otherwise crystal clear. *Vachon vs. New Hampshire*, 414 U.S. 478 (1974). It is settled law that allegations as to weight and sufficiency of the evidence, most definitely do not state a constitutional claim and furthermore are not cognizable in federal habeas corpus. *Brooks vs. Rose*, 520 F. 2d 653 (6th Cir., 1975); *Ballard vs. Howard*, 403 F.2d 653 (6th Cir., 1968).

This Court reading the transcript in this case in a light most favorable to the petitioner, is hard put in finding any evidence to support this claim. In fact, the totality of the transcript completely refutes said allegation. *Mullaney vs. Wilbur*, (1975) 420 U.S. 685, 44 L-Ed., 2nd 508. The court held unconstitutional a *Maine* statute which required the defendant to prove by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce a homicide charge from murder to manslaughter. In *Mullaney*, the state did not have the obligation of proving one of the elements of the crime charged therein. It placed that obligation upon the defendant to proof one of the elements of the crime by a preponderance. However, in the event that the defendant did not rebut the element that the state did not have to proof, it became a presumption of law and rested unrebutted. This differs widely with the case before review in that the question raised here is merely and solely a statutory question and is not a constitutional issue as it appears in *Mullaney*. The case before review does in fact require the state to prove each and every material element of the charge beyond a reasonable doubt. Therefore, it is dissimilar to the case of *Mullaney vs. Wilbur*, (supra).

The case before review requires a study of O.R.C. 2901.05, which in pertinent part, reads:

> "(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.
>
> "* * *

"(C) As used in this section, an 'affirmative defense' is either of the following:

"* * *

"(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused on which he can fairly be required to adduce supporting evidence."

Judge Corrigan, dissenting in *State vs. Robinson*, 47 Ohio St. 2d, 103 (1976), stated:

"This statute merely reiterates the common-law principle which places upon the defendant the burden of going forward with an affirmative defense. The statute does not mention the degree of proof required for that affirmative defense, but the requirement of proof by a preponderance of the evidence, for such affirmative defense, has been the common law of Ohio for well over 100 years. Rather, the statute strengthens the defendant's position, if he relies on a defense of excuse or justification pecularily in his knowledge, by mandating that, under such defense, he can *fairly be required to adduce supporting evidence*. It must be borne in mind, also that before a defendant in a homicide case can be required to establish that the killing by him was an unlawful killing within the degree of the crime charged *Taylor v. State* (1909), 12 C.C. (N.S.) 486, 21 C.D. 602."

Further Judge Corrigan stated in Robinson:

"This court has no legislative authority and should not make its duty of expounding statutes a cloak for supplying something omitted from an Act by the General Assembly. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of a statute to meet a situation not provided for. *State, ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65."

Finally, in its' opinion, the majority held, "Because our decision in this case is based upon Statutory Law, one need not consider whether Mullaney might constitutionally mandate a similar result."

Seemingly, the opinion in Mullaney (supra) has been misinterpreted by a significant portion of our legal community and further has been miscontrued.

The underline thesis of *Mullaney* (supra) is clearly stated in *Patterson vs. New York* (1977), 45 U.S.L.W. 4708, 4711-13.

"We thus decline to adopt as a constitutional imperative, operative country-wide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirma-

tive defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. *Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.* (emphasis added)

"This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard. '[I]t is not within the province of a legislature to declare an individual guilty or presumtively guilty of a crime.' *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916). The legislature cannot 'validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt.' *Tot v. United States*, 319 U.S. 463, 469 (1943). See also *Speiser v. Randall*, 357 U.S. 513, 523-525, (1958). *Morrison v. California*, 291 U.S. 82 (1934), also make the point with sufficient clarity.

"Long before *Winship* [*In re Winship*, 397 U.S. 358, 364 (1970)], the universal rule in this country was that the prosecution must prove guilty beyond reasonable doubt. At the same time, the long accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant. This did not lead to such abuses or to such widespread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required. This was not the problem to which *Winship* was addressed. Nor does the fact that a majority of the States have now assumed the burden of disproving affirmative defenses—for whatever reasons—mean that those States who strike a different balance are in violation of the Constitution."
"* * *

Mullaney's holding can be distinguished. In *Mullaney* we find a *Maine* statute required the defendant to prove an element of the crime charged otherwise it would be presumed and could be rebutted by the defendant by the preponderance of the evidence. This then is not the case in review here. In the

petitioner's case, the Ohio law does not require the defendant to prove any of the elements of the principle charge or any of its lesser and included offenses. The alleged claim that the charge of Court was in violation of the United States Constitution, is without merit. The mere requirement in a state statute setting forth the requirements of proof as to affirmative defense, and who must go forward in proving same, is solely and completely a statutory issue and does not reach constitutional dimensions.

It is well to note that the latest pronouncements from the high court, seem to clearly point out that the United States Constitution does not forbid the state legislatures from setting forth statutory requirements as to proof in affirmative defenses, so long as the law definitely places the burden on the State or Government to never-the-less prove each and all the necessary elements of a crime charged or its lesser included offenses, beyond a reasonable doubt. It merely becomes a state statutory construction issue and not one involving Due Process of the Fourteenth Amendment of the United States Constitution.

It can be further noted the Due Process Clause of the Fourteenth Amendment to the United States Constitution does not preclude placing upon the criminal defendant the burden of proving an assertion of an affirmative defense. The United States Supreme Court, in *Leland vs. Oregan*, (1952), 343 U.S. 790, held that a statute which cast upon a defendant the heavy burden of proving his insanity beyond a reasonable doubt *did not* violate *due process* where, under other statutory requirements, the state had the burden of proving every element of the crime charged beyond a reasonable doubt, including in the case of first degree murder, premeditation, deliberation, malice and intent. It becomes crystal clear when reading the above charge of the Court herein that the jury was told time and time again the burden of proof placing solely upon the state to prove all the elements of the crime and its lesser included offense by a degree of beyond a reasonable doubt. It further emphasizes that in the event the affirmative defense fails in its proof, the state must *still* prove all of the elements of the crime and the defendant has no burden to prove any of the elements of the crime charged.

Self-defense, insanity and duress falls in a class of defenses that in no way negates the existence of an element of the state's case. Therefore, theoretorically possible for a trier of fact to conclude beyond a reasonable doubt that a defendant has committed a crime but still brings in a verdict of not guilty. In

this kind of defense, the defendant is obviously seeking to avoid punishment by injecting a separate factor and thus proper for him to prove that fact.

Citing for the above, *Leland vs. Oregan*, supra, which upheld constitutionality, a state rule that required defendants to prove the defense of insanity. Further on this subject, Justice Relinquist, in *Wilbur* said he felt *Leland* was still valid because:

> "... the existence or nonexistence of legal insanity bears no necessary relationship of the existence or nonexistence of the required mental element of the crime." 95 S. Ct. at 1893.

Also on this point, the Supreme Court in *Revera vs. Delaware*, (1976), 429 U.S. Section 77, dismissed the case on the grounds that there was no substantial federal question. In the Supreme Court of Delaware in *Revera vs. State*, (1976), 351 A. 2nd. 561, the Court sustained the constitutionality of a state statute requiring a criminal defendant raising an insanity defense to prove mental illness or defect by preponderance of the evidence *Ohio vs. rel. Eaton vs. Price* (1959), 360 U.S. 246, 247.

> "Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balance of society's interest against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case..."

In view of the above comments, the petitioner's claim, number one, is without merit.

II

With respect to the second claim for relief, the petitioner also contends his right of due process was violated by reason of certain prosecutorial misconduct during the prosecutor's cross examination of petitioner and in his closing argument.

The petitioner identifies the following questions and answers as his basis for said allegation:

> Q. Now where did you but this gun that Mr. Fannelly. . .
> A. I believe, I can't say exactly, but I believe it was about last January, not this January.
> Q. O.K. That was shortly after your M-1 was confiscated.
> (TR. 284)

At this point, the trial court stated to the prosecutor:

> That's an improper question, Mr. Zuch, and I don't want to admonish you again.
> (TR. 284)

At page 285 of Volume 2, at the request of the defendant, the jury was told to disregard those questions. Prior to the above exchange, Gracie Humes testified for the defense concerning the petitioner's good character and propensities for peace. Further, during petitioner's direct testimony, petitioner indicated that he had been convicted of approximately four misdemeanors.

Upon cross-examination, the state attempted to ask questions concerning an incident, one year previous, where the petitioner used an M-1 carbine rifle in an attempt to settle a disagreement over another woman. As this questioning was attempted, the trial court requested the state, out of the presence of the jury, to indicate its justification for area of inquiry. Three alternate grounds were presented: Ohio's other and similar acts doctrine, the fact that petitioner had put his character and non-violent proclivities in issue, and that upon direct examination that petitioner had opened up this avenue for cross-examination. (TR. 271-274). The trial court rejected these alternatives and instructed the prosecutor that he could not go behind any conviction. At page 275 of Volume 2, at the petitioner's request, told jury to disregard those questions.

The quoted question above was asked on recross, after on redirect, the petitioner had testified as to his motivation for owning the gun which he used to shoot Johnson. (TR. 283-285). All objections be defense counsel sustained, and the jury was instructed to disregard the questions (TR. 269, 275, 276, 284). A motion for mistrial was denied on the merits and also not timely made (TR. 289).

Upon appeal the state court said the following on this issue:

> "Defendant, through another witness placed his character in issue by the introduction of testimony as to his good character and peaceful conduct generally. In each instance, the prosecution was not permitted on cross examination to be beyond the conviction of prior violations of law. All special jury instructions requested by the defendant in this area were granted, including the granting of all objections advanced by the defendant during trial. We find no specific acts or conduct of the prosecution, during trial or in final argument, prejudicial to the appellant."

The petitioner isolates from a voluminous record a few alleged improper questions during the prosecutor's cross-examination and in his closing argument. There is a basic and fundamental general rule that the prosecutor may cross-examine a witness on all relevant facts that was or could be developed on direct examination and this also holds for fair argument to the jury by the prosecutor, so long as the arguments are consistent with the facts.

As Chief Justice Burger once wrote, "a criminal trial is not a minuet," *Taylor vs. United States* (D.C. Cir., 1969), 413 F. 2nd. 1095, 1096.

The United States Supreme Court stated in *Berger vs. United States* (1934), 295 U.S. 78, 88, that the prosecutor "may strike hard blows" so long as he avoids foul ones. Courts grant the prosecution enormous discretion in his selection of words so long as the substance of his questions and comments is supported by the record. *United States vs. Jones* (D.C. Cir., 1973), 482 F. 2nd 747, 753 (defendant referred to as an "executioner"; *United States vs. Bivona* (2nd. Cir.), 487 F. 2nd. 443, 446 (defendant's testimony characterized as "lies"); *United States vs. Lucianetti* (E.D. Penn., 1972), 369 F. Supp. 358, 363-64, (defendant referred to as a "liar" and a "crook"). On this issue also see; *Donnelly vs. Di Christofo,* 42 L.W. 4682 (1974); *Smith vs. United States,* 315 A. 2nd (D.C.C.A. 1974).

To add to the fairness of the facts in the instant case, the Judge, with each request to admonish the Jury not to consider those alleged improper questions was so instructed, thereby curing any possible alleged error. The refusal to grant a mistrial rested within the sound discretion of the trial court. *Wallace vs. Havener,* No. 76-1028 (6th Cir., 1977).

Consequently, the prosecutor's cross-examination of the

defendant and the prosecutor's argument to the jury were far short of any dimensions of denying the petitioner's rights under the due process clause of the United States Constitution.

Petitioner is not entitled to a perfect trial but had more than a fair trial, being ably represented by defense counsel. Any attempts by the prosecution to sail into forbidden waters were prevented by the trial court and by defense counsel to the extent that no prejudice resulted.

In view of the above comments, the petitioner's claim, number two, is without merit.

CONCLUSION

In the instant case there has been no showing of an constitutional infringement in statutorily requiring the defense to establish self-defense by a preponderance of the evidence where, as here the jury was repeatedly instructed by the Court in it's charge that the burden rests solely upon the state to prove each and all of the elements of the general charge as well as the elements of any lesser included offenses beyond a reasonable doubt (TR. 330, 331, 336-338, Vol. 2). It further charged the jury that even if the defense fails, the burden *still* remains upon the state to prove each element of the crime beyond a reasonable doubt (TR. 343, Vol. 2).

The charge as to self-defense was merely a statutory issue and does not rise to any constitutional dimensions.

It is also noted that at page 354, Volume 2, the petitioner takes no exception to the charge except as to the subject of Aggravated Murder and murder.

The petitioner was afforded a full and complete charge and the court protected the petitioner's rights of due process as mandated by the United States Constitution.

RECOMMENDATION

It is recommended that the petition for writ of habeas corpus be denied.

Charles R. Laurie
United States Magistrate

CERTIFICATE OF SERVICE

I, Charles R. Laurie, United States Magistrate, do hereby certify that a copy of the *Report and Recommended Decision of Magistrate,* has been forwarded to the Petitioner, at:

HOWARD HUGHES, Reg. No. 140-983
Chillicothe Correctional Inst.
Box No. 5500
Chillicothe, Ohio 45601

via the United States Postal Service on this 18th day of August, 1977.

Charles R. Laurie
United States Magistrate

CERTIFICATE OF SERVICE

I, Charles R. Laurie, United States Magistrate, do hereby certify that a copy of the *Report and Recommended Decision of Magistrate,* has been forward to the Respondent at:

Simon B. Karras
Assistant Atty. General
30 East Broad Street
State Office Tower, Suite 1513
Columbus, Ohio 43215

via the United States Postal Service on this 18th day of August, 1977.

Charles R. Laurie
United States Magistrate

Hughes v. Engle (USDC/NE) #C77-156A

NO. C77-156A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[FILED NOVEMBER 27, 1978]
***Clerk Stamp Deleted**

HOWARD HUGHES
Petitioner
vs.
TED ENGLE, Superintendent
Respondent

O R D E R

Petitioner has moved the Court for twenty days leave in which to file a supplemental brief in support of his petition for habeas corpus relief under 28 U.S.C. Section 2254.

With regard to the petition herein, petitioner asserts as his first ground for relief that the state failed to prove beyond a reasonable doubt every element of the crime charged, and that the trial court failed to so instruct the jury. In his subsequent memorandum in support thereof and contra the state's Return of Writ, he explains such ground by alleging that his due process rights were violated by the trial court's instruction placing upon him the burden of proving self defense.

After reviewing the entire record in this action, however, the Court entertains serious reservations with regard to its rightful jurisdiction over said issue. Specifically, it is not clear whether there has been an exhaustion of all available state court remedies with regard to the question raised by ground one. Thus the Court shall grant petitioner leave until November 13, 1978 to submit a brief and whatever other materials he deems appropriate, if any, addressed to exhaustion as required by 28 U.S.C. Section 2254(B) and (c). The state shall be granted an opportunity to respond thereto.

Accordingly, the instant motion is hereby granted to the extent set forth above, and petitioner shall file its brief on or before November 13, 1978. Respondent shall file any response thereto on or before November 20, 1978.

IT IS SO ORDERED.

*Signature Deleted
Leroy J. Contie, Jr.
U.S. District Judge

Hughes v. Engle (USDC/NE) #C77-156A

NO. C77-156A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[FILED JUNE 4, 1979]
***Clerk Stamp Deleted**

HOWARD HUGHES
Petitioner
vs.
TED ENGLE, Superintendent
Respondent

O R D E R

Pursuant to this Court's Order of November 2, 1978, petitioner and respondent have submitted briefs addressed to the issue of exhaustion of state remedies as required by 28 U.S.C. Section 2254(b) and (c).

Upon consideration, the Court concludes that petitioner has exhausted available state remedies with regard to both grounds advanced in support of his petition. See *Keener v. Ridenour*, 594 F. 2d 581 (6th Cir. 1979); *Collins v. Perini*, 594 F. 2d 592 (6th Cir. 1979).

In their respective briefs, petitioner and respondent have each requested leave to file a further brief addressed to the merits of petitioner's claims for relief.

Accordingly, the parties herein shall file briefs addressed to the merits of the grounds advanced in support of the petition on or before June 18, 1979.

IT IS SO ORDERED,

*Signature Deleted
Leroy J. Contie, Jr.
U.S. District Judge

State v. Hughes (CCP Summit) CR-74-11-1206

STATE OF OHIO SUMMIT COUNTY

NO. 74-11-1206

INDICTMENT FOR: AGGRAVATED MURDER (1)

[FILED DECEMBER 16, 1974]
REVISED CODE SECTION: 2903.01(A)

In the Common Pleas Court of Summit County, Ohio, of the term of September in the year of our Lord, One Thousand Nine Hundred and Seventy-Four.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, being duly impanelled and sworn and charged to inquire of and present all offenses whatever committed within the limits of said County, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO,

DO FIND AND PRESENT, that HOWARD HUGHES on or about the 26th day of October, 1974, at the County of Summit, aforesaid, did commit the crime of AGGRAVATED MURDER in that he, did, purposely and with prior calculation and design, cause the death of Lemuel W. Johnson, in violation of Section 2903.01(A) of the Ohio Revised Code, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

STEPHAN M. GABALAC
Prosecuting Attorney
Summit County, Ohio

MARY F. ROSSI
Foreman of the Grand Jury

A TRUE BILL

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MR. FANELLY: Yes. I would like to have the Charge of the lesser included offenses of Voluntary Manslaughter, Murder and Self-defense.

THE COURT: Do you care to be heard on that, Mr. Prosecutor?

MR. ZUCH: One second, your Honor. Your Honor, we'd merely like to bring to the Court's attention State vs. Nolton, as regards the Charge of when Self-defense is raised. The State maintains that the law supported by that particular case states that when self-defense is presented that the—there's no lesser included offenses. They are saying that he's completely justified in the act, and that self-defense is in and of itself an essential element of the crime.

THE COURT: Overruled. I'm going to charge on the lesser included of Murder and Voluntary Manslaughter.

MR. FANELLY: Your Honor, I'd like to at this time make a motion. I'd like to ask the Court to declare a mistrial based on the statements made by Prosecutor Zuch referring to the M-1 rifle and that that had been made but for one purpose; to prejudice the mind of the Jury, and that it

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perhaps would lead them to believe that this man may be involved with the Black Muslems, or something of that sort. It was indeed a very improper question. I'm sure Mr. Zuch is a very seasoned Prosecutor, and he should have known that was an improper question. So at this time—

THE COURT: Mistrial is overruled, not only on the merits of your motion but the timeliness of it. It was not made at the time of the transgression. You may have your exception.

MR. FANELLY: Thank you, your Honor.

THE COURT: Anything else, Mr. Fanelly?

MR. FANELLY: No.

MR. KIRKWOOD: I take it the Charge will be Aggravated Murder, Murder, Voluntary Manslaughter, with the Self-defense extra?

THE COURT: Right. Anything else any of you want charged on?

MR. FANELLY: You will have all the boiler plate things, I'm sure.

THE COURT: Right. Time of argument. Now, it's my policy to allow you whatever time you want within reason, but hold you to the time allotted. What is your pleasure?

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(Whereupon, at 9:58, the morning recess was had.)

CHARGE OF THE COURT

Ladies and gentlemen of the Jury: You have heard the evidence and the arguments of Counsel, and it is now my duty to instruct you on the law which applies to this case. The Court and the Jury have separate functions. You decide the disputed facts and the Court provides the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law nor to apply your own conception of what you think the law should be.

A criminal case begins with the filing of an Indictment. The Indictment informs the Defendant that he has been charged with a crime. The fact that it was filed may not be considered for any purpose. The plea of not guilty is a denial of the charge and puts in issue all of the essential elements of the crime. The Defendant raises the issue of Self-defense, which I will explain to you later.

Now, the Defendant is presumed innocent until his guilt is established beyond a reasonable doubt. The Defendant must be acquitted unless the State produces

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in evidence.

The emotional stress or condition must be extreme. That is, it must be great in nature and intensity, and it must exist at the time of the act or acts that caused the death of Lemuel Johnson.

However to reduce a purposeful murder to Voluntary Manslaughter the extreme emotional stress must be brought on by serious provocation. Provocation, to be serious, must be reasonably sufficient to bring on the extreme emotional stress, and the provocation must be reasonably sufficient to incite or to arouse the Defendant into using deadly force.

In determining whether the provocation was reasonably sufficient to incite the Defendant into using deadly force, you must consider the mental and emotional state of the Defendant,

and the circumstances and conditions that surrounded him at that time.

When a person knowingly kills another while under extreme emotional stress brought on by serious provocation reasonably sufficient to cause him to use deadly force to kill another, then such killing is Voluntary Manslaughter.

If the emotional stress is not extreme, or if such stress is not present at the time of the act, or if the provocation is not reasonably sufficient to cause the

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Defendent to use deadly force or knowingly kill the decedent, then such killing was not Voluntary Manslaughter.

Now, the Defendant claims that what he did was justified on the basis of self-defense. And this defense applies to not only the charge of Aggravated Murder, but the lesser included charges which I have described to you.

If a person is assaulted by another who apparently intends to kill or cause great bodily harm, the person assaulted is not required to retreat, but may repel force with force and may kill his assailant if it reasonably appears to the Defendant to be necessary to do so.

To constitute Self-defense there must have been on the part of the Defendant a careful use of his faculties and reasonable grounds to honestly believe that there was an imminent danger to his person or to his life. There must have been a sufficient act coupled with an apparent present ability to carry it out to cause the Defendant to reasonably believe that the other parties intended to kill him or to do great bodily harm, and that the killing of the decedent was necessary to save himself from death or great bodily harm.

If the Defendant had reasonable grounds and an honest belief that he was in imminent danger of death or great bodily harm, and that the only means of escape

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from such danger was by killing his assailant, then he was justified even though he was mistaken as to the existence of such danger.

Resort to the use of a dangerous weapon is not permitted because of words. Vile or abusive language, or verbal threats, no matter how provocative, do not justify an assault or the use of a dangerous weapon.

In determining whether the Defendant had reasonable grounds for an honest belief that he was in imminent danger, you must put yourself in the position of this Defendant, with his characteristics, his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at the time. You must consider the conduct of the decedent and determine if his acts and words caused the Defendant to reasonably and honestly believe that he was about to be killed or receive great bodily harm.

The law does not measure nicely the degree of force which may be used to repel an assault. However, if a person who is assaulted uses more force than reasonably appears to be necessary under the circumstances, and if the force used is so grossly disproportionate to his apparent danger as to show revenge or an evil purpose to injure his assailant, then the Defense of Self-defense is not available.

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The Defendant must establish that the other party was the aggressor and that the Defendant did not himself provoke and cause the injury. The plea of self-defense is not available to the person who starts a fight unless in good faith he withdraws from the contest and informs the other party of his withdrawal, or by words or acts reasonably indicates he has withdrawn and is no longer participating in the fight.

A Defendant is not in a position to claim self-defense if he thought trouble and armed with a dangerous weapon he provoked a fight or renewed a fight that had broken off and did not attempt to avoid it or leave the scene of trouble.

If, in the careful and proper use of his faculties, the Defendant honestly believed and had reasonable grounds to believe that an assailant was not able and did not intend to kill or do great bodily harm to the Defendant, then the Defendant having notice of his adversary's position was released from danger, and the right to use force in self-defense ended. If thereafter the Defendant continues he becomes the aggressor and a subsequent injury to another is unlawful.

The burden of proving the Defense of Self-defense is upon the Defendant. He must establish such Defense by a preponderance of the evidence.

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Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your minds the evidence opposed

to it. In determining whether an issue has been proved by a preponderance of the evidence you should consider all of the evidence regardless of who produced it.

If the Defendant fails to establish the Defense of Self-defense, the State still must prove all of the essential elements of the crime charged or any lesser included offense by proof beyond a reasonable doubt.

If you find that the State proved beyond a reasonable doubt all of the essential elements of the crime of Aggravated Murder, or of the lesser included charges, and that the Defendant failed to prove by a preponderance of the evidence the Defense of Self-defense, your verdict must be guilty as to the charge of Aggravated Murder, or the lesser included charges.

If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of the crime of Aggravated Murder, or any of the lesser included charges, or if you find the Defendant proved by a preponderance of the evidence the Defense of Self-defense, then you must find the Defendant not guilty.

As I indicated, if the evidence warrants it, you may [344] find the Defendant guilty of a crime lesser than that charged in the Indictment. However, not withstanding this right, it is your duty to accept the law as given you by the Court, and if the facts and law warrant a conviction of the crime charged in the Indictment, then it is your duty to make such finding uninfluenced by your power to find a lesser offense.

The provision allowing you to find a person guilty of a lesser included offense is not designed to relieve you of the performance of an unpleasant duty. It is included to prevent failure of justice if the evidence fails to prove the original charge, but does justify a verdict for a lesser crime.

Now, you will have with you in your Jury Room one verdict form, which will cover all the possible results you may arrive at. I think it's self-explanatory but I'll go over it with you.

It starts off by saying, "We, the Jury in this Case, being duly impaneled and sworn to well and truly try and true deliverance make between the State of Ohio and the defendant, Howard Hughes, do find him blank of Aggravated Murder." That's the first charge you will consider, and if you find him guilty of Aggravated Murder then you needn't worry about the rest of

the form. But if you find him not guilty of Aggravated Murder then you

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and that each juror has the opportunity to discuss the case and to cast his vote. Otherwise the authority of the foreman is the same as any other juror.

Until your verdict is announced in open court you are not to disclose to anyone else the status of your deliberations or the nature of your verdict.

If Counsel has any request for additional Charge or objection to the Charge, you can approach the bench.

MR. FANELLY: May we approach the bench, please?

(Discussion between the Court, Mr. Fanelly and Mr. Zuch at the bench, out of the hearing of the Jury and Reporter, off the record.)

THE COURT: I think I had covered it, but to make sure that you understand, it's been requested that I indicate to you that if you find that the Defense of Self-defense has been proven then you should return a verdict of not guilty on the Aggravated Murder, and all the lesser included charges, which would constitute an acquittal.

All right, Mr. Fanelly?
MR. FANELLY: Thank you, your Honor.
THE COURT: Okay. You may now retire.

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There's a chance you wouldn't reach a verdict by noon, and the law requires that once you get a criminal case that you must—that you cannot be separated during the lunch hour, which means that you will have to go to lunch in a body under the charge of the Bailiff and the Jury Commissioner. So I'll have the Bailiff check in with you about 11:30 or so and see whether you're going to need arrangements for lunch or not.

So with that you can retire and commence your deliberations.

(Whereupon, at 10:56 a.m., the Jury retired to begin deliberations.)

(Whereupon, the following was had in open court, out of the presence of the Jury:)

THE COURT: Let the record show that when the Court invited Counsel to approach the bench for objections to the Charge, Mr. Fanelly, out of the hearing of the Jury, made an objection, which I will let you now state into the record.

MR. FANELLY: Yes. Thank you, your Honor. Off the record, a minute.

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(Discussion off the record.)

MR. FANELLY: First of all, may I say for the record that I'm going to object to the entire Charge in its entirety, but for one purpose. We are operating now under a new code in which many things are uncertain. So for the preservation of the record at this time, in view of the fact that this is something new, and particularly going to the elements of purposely, with prior calculation and design, I will at this time on the elements of that Aggravated Murder, Murder and Voluntary Manslaughter, object to the Charge in its entirety.
I specifically—oh. That's in generalities.

Now, specifically, I object to the Charge of Voluntary Manslaughter in that if you read in the code, I'm certain that the way the Court dictated his Charge under Voluntary Manslaughter, that we as lawyers and the Court understands the same, but we must take into consideration that the Charge is given to lay people.

The code puts it in this way: "Even if the death was purposely caused, the Defendant may be entitled to a Charge on the lesser included offense

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of Voluntary Manslaughter, where he was under emotional stress, because proof of purpose also includes proof of knowledge." Under 2901.22.

In other words, there is such a gray area today. In the old days, under Manslaughter, it was defined as hot blood. We no longer have that Charge, so that Murder is the mere purposefully taking of a life, which is intentional.

Now, Voluntary Manslaughter is a gray area under our new code, so that even though it may be purposely, which could be Murder or could be Voluntary Manslaughter, I believe that the way the Court gave his Charge, it was in reverse and not quite as understandable to a lay individual, in that if the Court at my request would have again said, even if the death was purposely caused—which is the element and the only element of Murder—the Defendant may be entitled to a Charge on the lesser included offense of Voluntary Manslaughter, where he was under extreme emotional stress.

In other words, the Court saw fit to grant that Charge, so it's no longer "may", it's mandatory. So that the Court should have given it in this fashion, as it's set out in the code, but perhaps elucidate to the Jury as to the fact that although

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in Murder all that is required is the purposeful killing, however if it's done under emotional strain or stress—extreme emotional strain or stress—it is elucidating on the point that I hope to try to make today.

Now, your Honor, do you have your Charge there? In other words, to finish, the Court did touch upon it, but in a reverse fashion which would not be as greatly understood by a lay individual as His Honor or I or the Prosecutor would understand.

For example, the Court in his Charge started out under Voluntary Manslaughter, which was the first comment, and then he goes on into emotional stress. The Court said as follows: The emotional stress or condition must be extreme. I don't argue with that; that is, that it must be great in nature and intensity, and it must exist at the time of the act or acts that caused the death of the decedent. However, to reduce a purposeful Murder to Voluntary Manslaughter—now he's covering it at this point—the extreme emotional stress must be brought on by a serious provocation. Now he has in that way said it but in reverse, so that if it would be said as the Code fits it, that even though the act—or the cause of death was purposely, if it was done

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under emotional strain and stress, extreme stress, then, of course, it should be considered as Manslaughter.

So that although he has touched upon it it is much more clear and understandable to a lay individual as set forth in the Code, and I would be under the impression that we should

follow the definition as set forth under the Code, particularly under the new provision.

Excuse me. Off the record a minute.

MR. ZUCH: Well, for the record, I would like to say that the State has no idea what Mr. Fanelly is talking about.

THE COURT: I think when you say the Code, you're not reading from the Code, you're reading from some Comment on—

MR. ZUCH: The only way the State would like to respond to that, your Honor, is that that is a declaration of what in fact are lesser included offenses. That's not the text of the Statute, that's an annotation in a book that's put out by the Program of Continuing Legal Education.

What that paragraph that was read by Mr. Fanelly means, I believe, is whether or not to in fact give the Charge of Voluntary Manslaughter or not. It

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certainly doesn't change the culpable mental state, if in fact that's what he's referring to.

THE COURT: I think what you're saying is, I did it but not as well as you could have done it.

MR. FANELLY: No, not that at all. This is something new, and I'm not even sure, but I felt that the way the book here explained it it was a little more clear, because, you see, Murder is merely the purposeful taking of a life. And yet it can still be purposeful, and if under extreme emotional stress it would be considered Voluntary Manslaughter.

THE COURT: You may have your exception.

MR. FANELLY: Thank you.

MR. ZUCH: Does the Defense Counsel have any other objection to any other portion of the Charge?

MR. FANELLY: I have in generalities made an objection to the Charge insofar as the new Code, pertaining to Aggravated Murder, Murder and Voluntary Manslaughter, because it's so new, in generalities, to protect the record.

THE COURT: Okay.

MR. FANELLY: Thank you, your Honor.

State v. Hughes (CA Summit) #CA 7717

STATE OF OHIO
Summit County

STATE OF OHIO
Plaintiff-Appellee
v.
HOWARD HUGHES
Defendant-Appellant

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
(September Term, 1975).

C.A. No. 7717

APPEAL FROM JUDGMENT
ENTERED IN THE COURT
OF COMMON PLEAS OF
SUMMIT COUNTY, OHIO
CASE NO. 74 11 1206

DECISION AND JOURNAL ENTRY

DATED: September 24, 1975.

This cause was heard September 9, 1975, upon the record in the trial court and the briefs. It was submitted to the Court with out oral argument. The assignments of error were reviewed by the court and the following disposition made:

BRENNEMAN, J.

Defendant was charged with aggravated murder, R.C. 2903.01. A plea of not guilty was entered and the cause was tried to a jury. A verdict of not guilty of aggravated murder, not guilty of murder, but guilty of the lesser included offense of voluntary manslaughter was returned. A new trial was denied, and this appeal was thereafter timely filed.

These errors are claimed in support of this appeal:

"1. The jury's verdict was against the weight of the evidence.

"2. The prosecutor committed various acts of misconduct and not only in the trial of this cause but in his final argument.

"3. The court abused its discretion by its refusal to declare a mistrial due to the misconduct of the prosecutor.

In the afternoon of October 26, 1974, one Marie Hubbard, her four children, and one Roger Logan, Lemuel Johnson and Howard Hughes were all congregated at the home of Minnie Jackson. In addition to conversation, the record shows the defendant Hughes was argumentative concerning the relationship between Lemuel Johnson and Marie Hubbard in that the defendant Hughes was formerly a boy friend of Marie Hubbard, and that for some time prior to October 26, 1974, Lemuel Johnson had been keeping company with Marie.

As the conversation progressed, Hughes became more angry and aggressive in his language concerning Lemuel Johnson and Marie Hubbard. One of the children noticed a gun in Hughes' coat pocket. Johnson was not armed. The evidence established that Johnson sought to make peace, and extended his hand to Hughes in a gesture of friendhip saying, "Let's shake and be friends." Hughes refused, and thereupon fired two shots at Johnson, killing him.

At trial Hughes claimed self-defense.

The jury had sufficient evidence before it, including the testimony of the defendant, who testified to support his own defense. Little evidence, other than defendant's testimony, is shown of any aggressive overt act by decedent compelling or even inciting the defendant to the violent action he took of gunning down and killing Johnson. We reject Error No. 1. The jury has a right, and did find against defendant's claim of self-defense. See State v. Cliff, 19 Ohio St. 2d 31.

Defendant, through another witness placed his character in issue by the introduction of testimony as to his good character and peaceful conduct generally. In each instance, the prosecution was not permitted on cross-examination to go beyond the conviction of prior violations of law. All special jury instructions requested by the defendant in this area were granted, including the granting of all objections advanced by the defendant during trial. We find no specific acts or conduct of the prosecution, during trial or in final argument, prejudicial to the Appellant. See *State v. Elliot*, 25 Ohio St. 2d 249.

For this reason, we reject Errors No. 2 and No. 3 as both are cumulative as to each other.

Our examination of the testimony of the witnesses in this cause convinces us that the generosity of the jury finding the defendant guilty of the lesser included offense of voluntary manslaughter, as opposed to murder, is most difficult to understand. We do not attempt to reconcile the verdict, except to determine if the trial was free from prejudicial error, and we find no error of that character.

Judgment Affirmed.

The court finds that there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court, directing the Court of Common Pleas to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of Court of Appeals, at which time the period for review shall begin to run. Appellate Rule 22(E).

Exceptions.

WILLIAM H. VICTOR
Presiding Judge
—For the Court—

VICTOR, P.J. and
MAHONEY, J. CONCUR.

APPEARANCES:

STEPHAN GABALAC, Summit County Prosecutor, (Frederic L. Zuch, Asst. Prosecutor), 53 East Center Street, Akron, Ohio 44308, For Plaintiff-Appellee.

ANGELO A. FANELLY, Attorney at Law, 930 Centran Building, Akron, Ohio 44308, for Dependant-Appellant.

State v. Hughes (Ohio Supreme) #75-1026

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.
THE STATE OF OHIO,
Appellee,
vs.
HOWARD HUGHES,
Appellant.

1976 Term
To wit: March 19, 1976

No. 75-1026
MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for Summit County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Affidavit of Poverty

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

State v. Hughes (Ohio Supreme) #75-1026

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.
THE STATE OF OHIO,
Appellee.
vs.
HOWARD HUGHES,
Appellant.

1976 Term
To wit: March 19, 1976

No. 75-1026
APPEAL FROM THE COURT OF APPEALS

for Summit County

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing Joint Appendix have been served on respondents Lincoln Isaac, Kenneth Bell, and Howard Hughes by forwarding such copies to the offices of their respective counsel, James R. Kingsley, 157 W. Main Street, Circleville, Ohio 43113 and Jay McKirahan, Suite 330, 22 East Gay Street, Columbus, Ohio 43215, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Hughes, by U.S. Mail, postage paid, this ____ day of June, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio 43113; Kenneth Bell, #141-727, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302; Howard Hughes, c/o Beasley Surles, 163 Rhodes Avenue, Akron, Ohio 44302.

SIMON B. KARAS
COUNSEL OF RECORD